SUPREME COURT, U. S.

JUN 21 1965

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. 274

HELEN MASCUILLI, Administratrix of the Estate of Albert Mascuilli, Deceased,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX

	Page
OPINIONS OF THE COURTS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
REASONS RELIED ON FOR ALLOWANCE OF WRIT	6
I. The Finding of the Court Below That the Unsafe Condition Resulting From the Negligent Use of the Ship's Gear Did Not Render the Vessel Unseaworthy and Liable for the Death of a Longshoreman Is in Direct Conflict With the Decision of This Court in *Crumady v. "Joachim Hendrik Fisser,"* 358 U. S. 423 (1959), Wherein This Court Held That a Dangerous Condition Due to the Excess Setting of the Ship's Safety Devices Which Was Brought Into Play by the Negligent Operation of the Stevedores Renders the Vessel Unseaworthy and the Shipowner Responsible for the Resulting Death of the Longshoreman	6
II. The Decision of the Court Below in Holding That an Unsafe Condition Resulting From the Negligent Use by the Longshoremen of the Ship's Equipment Does Not Render the Vessel Unseaworthy Is in Direct Conflict With the Decisions of the Second Circuit in *Grillea v. United States,* 232 F. 2d 919 (1956); *Reid v. Quebec Paper Sales and Transportation Co.,* 340 F. 2d 34 (1965); and *Norfleet v. Isthmian Lines;* 355 F. 2d 359 (1966); the Fourth Circuit in *Scott v. Isbrandtsen Co.,* 327 F. 2d 113 (1964); and the Ninth Circuit in *Blassingill v. Waterman S. S. Corp.,* 336 F. 2d 367 (1964), Which Hold That a Dangerous Condition Caused by the Stevedores' Negligent Handling of Proper Equipment Renders the Vessel Unseaworthy and Its Owner Liable for the Resulting Injuries	8

INDEX (Continued).

Page

III. Where the Court Below Found That the Longshoremen Charged With Creating the Unseaworthy Condition Aboard the Vessel Were Found by the Trial Court to Be "Not Equal in Disposition and Seamanship to the Ordinary Men in the Calling", the Court Below Should Have Concluded That the Vessel Was Unseaworthy and the Shipowner Liable for the Resulting Death Under the Decision of This Court in *Boudoin v. Lykes Bros. S. S. Corp.*, 348 U. S. 336 (1955) 11

CONCLUSION 12

APPENDIX A 1a

APPENDIX B 3a

APPENDIX C 4a

CASES CITED.

Page

Blassingill v. Waterman Steamship Corp., 336 F. 2d 367 (9 Cir., 1964) 2, 8, 10

Boudoin v. Lykes Bros., 348 U. S. 336 (1955) 2, 5, 7, 11

Crumady v. "Joachim Hendrik Fisser", 358 U. S. 423 (1959) 2, 4, 5, 6, 7, 8, 9

Ferrante v. Swedish American Lines, 331 F. 2d 571 (3 Cir., 1964) 10

Grillea v. United States, 232 F. 2d 919 (2nd Cir. 1956) 2, 7, 8, 9

Mahnich v. Southern S. S. Co., 321 U. S. 96, 88 L. Ed. 561 7

Morales v. City of Galveston, 370 U. S. 165, 8 L. Ed. 2d 412 (1962) 10

Norfleet v. Isthmian Lines, 355 F. 2d 359 (1966) 2, 8, 9

Reid v. Quebec Paper Sales and Transportation Co., 340 F. 2d 34 (1965) 2, 8, 9

Scott v. Isbrandtsen Co., 327 F. 2d 113 (4 Cir., 1964) 2, 8, 10

Seas Shipping Co. v. Sieracki, 328 U. S. 85, 90 L. Ed. 1099 7

Smith v. Lauritzen, 201 F. Supp. 663 (E. D. Pa. 1962); affd. 3 Cir., February 9, 1966, No. 149[redacted] 11

Thompson v. Calmar Steamship Corp., 331 F. 2d 657 (3 Cir., 1964) 10

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No.

HELEN MASCUILLI, ADMINISTRATRIX OF THE ESTATE OF ALBERT MASCUILLI, DECEASED,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Helen Mascuilli, Administratrix of the Estate of Albert Mascuilli, Deceased, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled matter on March 24, 1966.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 241 F. Supp. 354 (Appellant's Appendix, 215a). The opinion of the Court of Appeals for the Third Circuit is reported at — F. 2d — (*infra*, p. 1a). The order of the Court of Appeals for the Third Circuit on the Petition for Rehearing, unreported, appears *infra*, p. 4a.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 31, 1966 (*infra*, p. 3a). The order denying rehearing was entered on March 24, 1966 (*infra*, p. 4a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Where the safety devices on a ship's loading gear are set at one and a half and three times in excess of the safe working load of the ship's gear and fail to arrest the electric current when the strain exceeded the safe working load of the gear, was the vessel not unseaworthy and the owner liable for the death of a longshoreman resulting from the fractured gear under the principle of law enunciated by this Court in *Crumady v. "Joachim Hendrik Fisser"*, 358 U. S. 423 (1959), wherein this Court held that where a dangerous condition due to the excess setting of the ship's safety devices is brought into play by the negligent operation of the stevedores, the resulting injuries must be deemed due to the unseaworthiness of the vessel?

2. Did the Court below err in failing to follow the principle of law enunciated by the Second Circuit,[1] the Fourth Circuit,[2] and the Ninth Circuit,[3] holding that a dangerous condition caused by the stevedore's negligent handling of proper equipment renders the vessel unseaworthy and its owner liable for the resulting injuries?

3. Where the longshoremen charged with creating the unseaworthy condition aboard the vessel are found by the trial court to be "not equal in disposition and seamanship to the ordinary men in the calling", should not the vessel have been held to be unseaworthy and the shipowner liable for the death resulting from that condition, under the decision of this Court in *Boudoin v. Lykes Bros.*, 348 U. S. 336 (1955).

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1. *Grillea v. United States*, 232 F. 2d 919 (1956); *Reid v. Quebec Paper Sales and Transportation Co.*, 340 F. 2d 34 (1965); and *Norfleet v. Isthmian Lines*, 355 F. 2d 359 (1966).

2. *Scott v. Isbrandtsen Co.*, 327 F. 2d 113 (1964).

3. *Blassingill v. Waterman S. S. Corp.*, 336 F. 2d 367 (1964).

STATEMENT OF THE CASE.

The undisputed facts show that petitioner's decedent, a longshoreman, was killed while employed by a stevedoring company aboard the S/S "Marine Fiddler", a cargo vessel owned by respondent. He left surviving him a widow and four minor children. The vessel had been fitted with special newly-developed heavy lift equipment, which features a complicated system of four guy lines, or vangs attached to the cargo hook pendant, to move the cargo and the heavy lift boom in a horizontal plane (14a, 15a, 40a, 56a, 104a, 190a). On other vessels, the boom is moved by two guy lines attached to the boom itself (21a, 85a, 135a). None of the longshoremen working aboard the vessel had ever seen or used such heavy lift equipment previously (136a, 15a, 21a, 52a), and this was known to the ship's officers (97a). Therefore, the equipment had been rigged by ship's personnel (97a) and a ship's officer was present supervising the longshoremen's operations (108a, 131a-132a, 140a-141a, 201a).

The longshoremen had started loading a cargo of heavy military tanks at 11:00 A. M. At 5:00 P. M., the ninth tank had been moved across the deck, was stopped to permit the carpenters below to complete their preparations, and was then lowered. Just as the bottom of the tank track passed below the hatch coaming, the port shackle suddenly broke with a loud report, and the vang lines recoiled and whipped back, mortally striking decedent who was at his position, near the after end of the hatch (45a, 63a, 77a, 89a).

The electric winch for each vang was rated at fifty horsepower or *183* amperes (148a), but each had an overload circuit breaker set to trip at *275* amperes and had to be manually reset (148a-149a, 151a), and the overload relay in the controller was set to trip at *550* amperes (149a). After the accident, examination revealed that none of these cir-

cuit breakers had operated despite the excessive strain that had been exerted sufficient to actually break the shackle (151a).

On the basis of pleadings and pre-trial admissions, Judge Harold K. Wood granted petitioner's motion for judgment on admitted facts, and, upon stipulation, the issue of damages was submitted to Judge John W. Lord, Jr., who awarded damages of $124,000.00. Respondent appealed, and the Court of Appeals reversed and granted a new trial (313 F. 2d 764). The case was tried again before Judge Ralph C. Body (without jury), who found that the accident was caused by the failure of the longshoremen to follow proper loading procedures, in that they permitted the forward and after vangs or guys to be simultaneously taut (221a). This, he stated, caused a dangerous condition known as "tightlining", upon which the exertion of any additional force would be sufficient to break the shackle. This did occur when, after a momentary stopping, the boom was moved again, superimposing further force on the tightline condition, breaking the shackle (221a-222a, 227a-230a). Judge Body failed to take into consideration the failure of the circuit breaker to shut off the power when the strain exceeded the safety limit of the gear. This was identical to the situation in *Crumady v. "Joachim Hendrik Fisser"*, 358 U. S. 423, 3 L. Ed. 2d 413 (1959), where the Court held the vessel unseaworthy and the owner liable when the ship's loading equipment, with a safety cut-off device set at higher than the tackle capacity failed to shut off the power and permitted the shackle to break when the negligent operation by the stevedores placed excessive strain on the gear.

In addition, in the case at bar, Judge Body found (236a) that the longshoremen being without any experience with this new equipment and using it in a manner which was admittedly dangerous, were not "equal in disposition and seamanship to the ordinary men in the calling", as a result of which the accident occurred. That finding of fact in-

dependently required the conclusion that the vessel was unseaworthy on the basis of this Court's decision in *Boudoin v. Lykes Bros.*, 348 U. S. 336 (1955).

Despite the undisputed facts and findings as above stated, the trial judge exonerated respondent on the ground that the negligence of the stevedore contractor caused the accident, and he ignored completely the Supreme Court's decision in *Crumady*, under identical facts, holding the shipowner liable. Notwithstanding his own order dismissing the libel, the trial judge drastically reduced the damage award, which had been fixed by Judge Lord (without jury) in the earlier trial, presumably upon the contingency that his order of dismissal might be reversed.

The Court of Appeals affirmed Judge Body's order of dismissal without discussion or consideration of the principles involved.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

I. The Finding of the Court Below That the Unsafe Condition Resulting From the Negligent Use of the Ship's Gear Did Not Render the Vessel Unseaworthy and Liable for the Death of a Longshoreman Is in Direct Conflict With the Decision of This Court in Crumady v. "Joachim Hendrik Fisser", 358 U. S. 423 (1959), Wherein This Court Held That a Dangerous Condition Due to the Excess Setting of the Ship's Safety Devices Which Was Brought Into Play by the Negligent Operation of the Stevedores Renders the Vessel Unseaworthy and the Shipowner Responsible for the Resulting Death of the Longshoreman.

The undisputed facts in this case reveal, just as in *Crumady v. "Joachim Hendrik Fisser"*, 358 U. S. 423, 3 L. Ed. 2d 413 (1959), that the ship's loading gear was equipped with cut-off devices, or circuit breakers, which had been improperly set to cut the power at a point of strain which was much higher than the equipment itself was designed to take. In *Crumady*, the device had been set twice the safe working load of the lifting gear; here, there were two devices, one set at one and one-half times and the other at three times the safe working load of the gear. Further, as in *Crumady*, with this dangerous setting, the stevedores operated the equipment in such a manner as to create great and excessive strain on the gear, and, when the safety device failed to cut off the power, the gear fractured and caused the tragedy which ensued. In *Crumady*, the timbers being raised were negligently permitted to become wedged under the coaming, and the winch power was increased without control until, pulling against an immovable object, the gear broke. Here, the stevedores improperly permitted excessive stress on the vang lines, and the winches, uncontrolled, continued to increase the

strain, until the shackle actually parted, and decedent was struck dead. Indeed, in the instant case, *an examination of the gear afterward indicated that neither of the two circuit breakers connected with the lift or the winches had even operated.*

In *Crumady*, the District Court had held the vessel unseaworthy, but the Court of Appeals for the Third Circuit held there, as it did here, that the sole cause of the injury was the negligence of the stevedores and that the vessel was not unseaworthy. This Court reversed, holding that, although the unsafe condition of the cut-off device was brought into play by the negligent action of the stevedores, the vessel must nevertheless be deemed to be unseaworthy and her owner liable for the consequences.

Mr. Justice Douglas, speaking for the Court, emphasized that the loading and unloading equipment, although in inherently good condition, was rendered, nevertheless, dangerous for its task because its "cut-off device" was improperly set to operate only *after* the load had exceeded the safe working load of the gear (U. S. at 425-26, L. Ed. at 416). This Court then reviewed the obligations of the shipowner to provide a seaworthy vessel to stevedores, which duty is non-delegable;[4] pointing out that unseaworthiness extends to the crew,[5] and to ship's appliances, as well as to the vessel itself, and that they must be maintained in a seaworthy condition;[6] and that the shipowner is not relieved of these responsibilities by "turning control" of loading or unloading over to a stevedoring company (U. S. at 426-27, L. Ed. at 416-17). Citing *Grillea v. United States*, 232 F. 2d 919 (2nd Cir. 1956), to note that "stevedores themselves could render a ship pro tanto unseaworthy and make the vessel owner liable for injuries to one of them", the opinion states that under the facts at hand (identical with the in-

4. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 95, 90 L. Ed. 1099, 1106.

5. *Boudoin v. Lykes Bros. S.S. Co.*, 348 U. S. 336, 99 L. Ed. 354.

6. *Mahnich v. Southern S. S. Co.*, 321 U. S. 96, 88 L. Ed. 561.

stant case), we need not go that far, since the facts demonstrate that the stevedores "did no more than bring into play the unseaworthy condition of the vessel". The winch, although not inherently defective, was an appurtenance of the vessel which was adjusted by these acting for the owner in a way that made it dangerous for the work at hand. Therefore, this Court said, the appurtenance, and, thus, the vessel, was unseaworthy and the shipowner liable for the results of that condition (U. S. at 427-28, L. Ed. at 417). The decision in the instant case is in flat conflict with *Crumady*, which encompasses the same principles of law, and the same antecedent facts and operating events. Such specific conflict with the mandate of this Court must be reviewed and reversed.

II. The Decision of the Court Below in Holding That an Unsafe Condition Resulting From the Negligent Use by the Longshoremen of the Ship's Equipment Does Not Render the Vessel Unseaworthy Is in Direct Conflict With the Decisions of the Second Circuit in Grillea v. United States, 232 F. 2d 919 (1956); Reid v. Quebec Paper Sales and Transportation Co., 340 F. 2d 34 (1965); and Norfleet v. Isthmian Lines, 355 F. 2d 359 (1966); the Fourth Circuit in Scott v. Isbrandtsen Co., 327 F. 2d 113 (1964); and the Ninth Circuit in Blassingill v. Waterman S. S. Corp., 336 F. 2d 367 (1964), Which Hold That a Dangerous Condition Caused by the Stevedores' Negligent Handling of Proper Equipment Renders the Vessel Unseaworthy and Its Owner Liable for the Resulting Injuries.

Even if we should ignore the existence of the underlying unseaworthiness due to the improperly set circuit breakers and winch controls, and we should assume that the equipment was seaworthy, the negligent use of this equipment by the stevedores, creating the dangerous "tightline" condition rendered the vessel pro tanto unseaworthy and

the shipowner liable for the results thereof. This was specifically discussed in *Crumady*, where this Court cited with approval the decision of the Second Circuit in *Grillea v. United States*, 232 F. 2d 919 (2 Cir. 1956). In stating that the vessel's equipment was seaworthy throughout the loading operations and that "the accident was caused solely by the negligent operation of the stevedoring crew" the Court below stated a factual situation which demanded, as a matter of law, a holding that the vessel was thus unseaworthy and the shipowner responsible therefor. The Court's failure so to hold not only conflicts with the statement by this Court in *Crumady*, but, also, with the consistent decisions of other Circuits, including the Second, Fourth and Ninth.

In *Grillea v. United States*, 232 F. 2d 919, 922-23 (2 Cir., 1956), a vessel, otherwise safe, was held to have become unseaworthy solely by the action of the injured party. There, the injured longshoreman had placed the wrong hatch cover over a pad-eye shortly before he stepped on it and it gave way. In *Reid v. Quebec Paper Sales and Transportation Co.*, 340 F. 2d 34, 35-36 (2 Cir., 1965), the ship was held unseaworthy and the shipowner liable, where a longshoreman was injured by a falling ladder which had been insecurely placed by a fellow longshoreman. The Court pointed out that, no matter who had placed the ladder, the shipowner had the "ultimate obligation" to see that it was properly placed (36).

More recently, in *Norfleet v. Isthmian Lines*, 355 F. 2d 359 (2 Cir., 1966), a pad-eye attached to the boom of the vessel broke during a loading operation, the testimony showing that the longshoreman operated the winch improperly, causing a "tightlining" as in the instant case, with resultant extreme pressure, breaking the pad-eye and injuring a longshoreman. The Court confirming the *Grillea* doctrine, then held that "even if an unseaworthy condition had been created by a negligent act of a fellow longshoreman, the shipowner may still be liable" (363-64), since his obligation in this regard is absolute, non-delegable and continuing.

In *Scott v. Isbrandtsen Co.*, 327 F. 2d 113 (4 Cir., 1964), a longshoreman was injured because of the negligent manner of unloading cargo used by his fellow longshoremen. The Court held that negligence of the longeshoremen themselves in the performance of the ship's work and in their method of operation causing a dangerous condition renders the vessel unseaworthy and the shipowner liable for injury to a longshoreman resulting therefrom (123-26).

In *Blassingill v. Waterman Steamship Corp.*, 336 F. 2d 367 (9 Cir., 1964), a longshoreman was injured when struck by a piece of cargo because of the unsafe method in which he and other longshoremen were unloading the vessel. The Court held that the employment of an unsafe method of unloading rendered the vessel unseaworthy.[7]

Indeed, other panels of the Third Circuit have, contrary to the instant case, below, been in agreement with the other Circuits.[8] In *Ferrante v. Swedish American Lines*, 331 F. 2d 571 (3 Cir., 1964), longshoremen negligently discharged plywood in a rope sling which they overloaded, despite the warning of the ship's officer against big loads. The panel[9] held, per Kalodner, J., that although the rope sling was itself seaworthy, the longshoremen's faulty method of operation and use of this equipment rendered the vessel unseaworthy and the shipowner liable. In *Thompson v. Calmar Steamship Corp.*, 331 F. 2d 657 (3 Cir., 1964), longshoremen, loading steel aboard ship from railroad cars, used lines from the ship's winches to move the railroad cars and did so in a dangerous manner injuring one of the longshoremen. The Court held that the longshoremen's improper method of operation rendered the vessel unseaworthy although the equipment itself was proper.[10] The shipowner's

7. In that case, the Court cited dictum of this Court in *Morales v. City of Galveston*, 370 U. S. 165, 8 L. Ed. 2d 412 (1962) supporting this doctrine.

8. The Third Circuit panel in the instant case consisted of Judges McLaughlin, Hastie and Smith.

9. Judges Kalodner, Staley and Smith.

10. The panel: Circuit Judges Staley and Ganey, and District Judge Nealon.

petition for rehearing was denied, per curiam, but two of the Judges[11] (who were also on the three-judge panel in the instant case) dissented, refusing as in the instant case to apply the now generally settled principle of operational unseaworthiness (663).

Thus, we have a singular conflict between the instant decision below and the other circuits, and a split within the Third Circuit, itself, upon the principle involved, requiring review by this Court upon this vital and extremely important question of law.

III. Where the Court Below Found That the Longshoremen Charged With Creating the Unseaworthy Condition Aboard the Vessel Were Found by the Trial Court to Be "Not Equal in Disposition and Seamanship to the Ordinary Men in the Calling", the Court Below Should Have Concluded That the Vessel Was Unseaworthy and the Shipowner Liable for the Resulting Death Under the Decision of This Court in Boudoin v. Lykes Bros. S. S. Corp., 348 U. S. 336 (1955).

After finding that the accident was caused by failure of the longshoremen to use proper loading procedure, the trial judge held that "the longshoremen crew was not 'equal in disposition and seamanship to the ordinary men in the calling' " at the time of the accident (Conclusion No. 17; 236a). As a matter of law, this finding required the conclusion that the vessel was, for this reason alone, unseaworthy. *Boudoin v. Lykes Bros. S. S. Corp.*, 348 U. S. 336, 99 L. Ed. 754 (1955). Since the incompetence of a seaman constitutes unseaworthiness, the incompetence of a stevedore doing the seaman's work similarly renders the vessel unseaworthy.[12] Failure of the Court below to so conclude, upon these findings, conflicts directly with this Court's decision in *Boudoin*.

11. Judges Hastie and Smith.

12. *Smith v. Lauritsen*, 201 F. Supp. 663 (E. D. Pa. 1962); affd. 3 Cir., February 9, 1966, No. 14941.

CONCLUSION.

The decision below, under undisputed facts, is in direct conflict with the settled doctrine of this Court, and, in addition, raises a sharp conflict among the Circuits, as well as within the Third Circuit itself. The factual situation is of frequent occurrence, as witness the cases which have come through the Circuits. The decision below, if not reversed, will, contrary to the mandates of this Court, seriously dilute the rights of longshoremen in their daily routine and will prevent the uniform application of the decision of this Court.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted to the end that the decision below be reversed.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15427

HELEN MASCUILLI, ADMINISTRATRIX OF THE ESTATE OF ALBERT MASCUILLI, DECEASED,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued December 17, 1965

Before McLAUGHLIN, HASTIE and SMITH, *Circuit Judges*

OPINION OF THE COURT
(Filed January 31, 1966)

PER CURIAM.

This case is before us for the second time. In our judgment, upon consideration of the whole record, including, inter alia, appellant's thorough statements of her view of the questions involved, the findings of fact by the trial

court that the vessel and its equipment were in a seaworthy condition at all times throughout the loading operations and that the accident was caused solely by the negligent operation of the stevedoring crew as stated in finding of fact #35, are not clearly erroneous. We find that the error, if any, is clearly not substantial in the references to the signal man, Majdowski in the trial findings of fact and conclusions of law. We have examined appellant's point with reference to the trial court's reassessment of damages. There is no necessity or use of our passing upon that argument.

The judgment of the district court will be affirmed.

APPENDIX B.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 4, 1965, be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

January 31, 1966

APPENDIX C.

SUR PETITION FOR REHEARING

Present: KALODNER, Chief Judge, and McLAUGHLIN, STALEY, HASTIE, GANEY, SMITH and FREEDMAN, Circuit Judges

The petition for rehearing filed by the appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

McLAUGHLIN, *J.*

Date: March 24, 1966